

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC.,

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9 Debtor.

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13 U.S. Bankruptcy Court

14 One Bowling Green

15 New York, NY 10004

16

17 January 21, 2016

18 10:07 AM - 11:05 AM

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23 B E F O R E :

24 HON SHELLY C. CHAPMAN

25 U.S. BANKRUPTCY JUDGE

1 Hearing re: Doc#51601 Motion to Reconsider FRCP 60 or FRBP
2 3008 of Aadit Seshasayee of the Disallowance of his Claim
3 Hearing re: Adversary proceeding: 10-03547-scc Lehman
4 Brothers Special Financing INC. v. Bank of America Natnoial
5 Association et al
6 Doc #1208 Motion by Amici Curiae SIFMA and ISDA for Leave to
7 File a Memorandum of Law in Support of the Noteholder
8 Defendants Omnibus Motion to Dismiss
9
10 Hearing re: Adversary proceeding: 10-03547 Lehman Brothers
11 Special Financing Inc. v. Bank of American National
12 Association et al
13 Doc #1210 The Structured Finance Industry Group's Motion for
14 Leave to file Amicus Curiae Brief in Support Defendant's
15 Motion to Dismiss
16
17 Hearing re: Adversary proceeding: 10-03547 Lehman Brothers
18 Special Financing Inc. v. Bank of American National
19 Association et al
20 Doc #1211 Motion of Proposed Amicus Curiae Structured
21 Finance Industry Group for an Order Authorizing Filing of
22 Documents Under Seal
23
24
25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 MR. FAIL: Good, Your Honor. Happy new year.

3 THE COURT: Happy New Year. I think it's the
4 first time in the new year?

5 MR. FAIL: It is. Good morning. For the record,
6 Garrett Fail, Weil, Gotshal & Manges for Lehman Brothers
7 Holdings, Inc. This morning, Your Honor, there are three
8 items ton the agenda, one contested matter and then two
9 under the adversary proceedings. Unless Your Honor prefers
10 otherwise, we would take the--the matters in the order that
11 they appear on the agenda.

12 THE COURT: That's fine.

13 MR. FAIL: The first item, then, is a motion to
14 reconsider and I would turn that over to the Claimant and
15 movant.

16 THE COURT: Okay. Very good.

17 MR. FAIL: Thank you, Your Honor.

18 MR. SCHECHTER: Thank you, Your Honor.

19 THE COURT: How are you?

20 MR. SCHECHTER: Good. Robert Schechter and Rachel
21 Parisi --

22 THE COURT: Hello.

23 MR. SCHECHTER: -- on behalf of Aadit Seshasayee.
24 So, thank you for hearing from us this morning, Your Honor.

25 THE COURT: Sure.

1 MR. SCHECHTER: This may be a small claim in the
2 eyes of Lehman Brothers Holding, Inc., but it is a life-
3 altering event for Mr. Seshasayee and his family. Mr.
4 Seshasayee worked for Lehman Brothers Holding, Inc. for
5 approximately fourteen years, and under 11 USC 502(j),
6 Bankruptcy Rule 9024 and Federal Civil Procedure 60(b)6,
7 there is certainly a basis to provide the relief requested
8 in Mr. Seshasayee's motion in the sound discretion of this
9 Court, and we believe that cause, the equities of this case
10 and due process dictate a ruling in favor of the requested
11 relief.

12 Mr. Seshasayee's motion doesn't open any
13 floodgates, it's a unique situation. He was served or not
14 served at all. If he was served, it looks as though the
15 claims noticing agent, if that's who handled this, put an
16 incorrect address on the location where they sent any
17 mailings, and also on the order on the motion, it was
18 granted that previous expunction claim, the incorrect
19 address was there as well, and we could not find an
20 affidavit service of that order. Mr. Seshasayee has no
21 recollection of ever receiving a motion to expunge his claim
22 --

23 THE COURT: Did he reside at the -- well, it -- it
24 all comes down to handwriting. I looked at the proof of
25 claim --

1 MR. SCHECHTER: Yes.

2 THE COURT: -- and it comes down to whether you
3 read it as Tec Gunter, T-E-C Gunter or Tre Gunter --

4 MR. SCHECHTER: That's correct, Your Honor.

5 THE COURT: -- and it's pretty much of a toss up,
6 but -- it's pretty much of a toss up, you know, but be that
7 as it may, did he reside at that address?

8 MR. SCHECHTER: So, he resided many places
9 temporarily at that time. This was a -- the home of a good
10 friend of his who he has shared with me he trusts and would
11 certainly apprise him of anything that was received on his
12 behalf, but as he shared in his certification, he was
13 constantly on the move, looking for employment at that time.
14 It was a very turbulent time for his entire family, and so
15 he was dependent on -- on his friend, who, again, he
16 certainly trusts. And I'll add it, as far as the proof of
17 claim goes, Your Honor, it is the Debtor at this point that
18 does hold the original proof of claim. I know we are all
19 looking at copies of it, but certainly the original of that
20 proof of claim would sit with the Debtor and its Claimants
21 and noticing agent.

22 THE COURT: Okay, I -- I don't know if I
23 understand the significance of that with respect to --

24 MR. SCHECHTER: To the extent that there may be
25 any further clarity in the original proof of claim that was

1 submitted.

2 THE COURT: I think the -- the copy that I've
3 looked at is -- is not a bad copy and I think that you could
4 ask a room full of people, is it T-E-C or is it T-R-E and
5 you know, it would be all over the lot. But there was no --

6 MR. SCHECHTER: I agree, Your Honor.

7 THE COURT: -- there -- there was no indication
8 that it was returned for non-delivery, in other words, going
9 to the -- or in fact there's another address that looks like
10 that, so.

11 MR. SCHECHTER: Well, on -- on that point, Your
12 Honor, I was --

13 THE COURT: Yes.

14 MR. SCHECHTER: -- honestly a little bit
15 surprised. There's no certification or any explanation of
16 what the procedures are for the noticing and claims agent if
17 they were to come across an address that they deemed
18 questionable or, you know, what they did here. I know there
19 was attorney's argument that there was nothing returned.
20 You know, I don't know anything more than that. I didn't
21 see anything asserted by, I presume, a third party that's
22 handling the mailing in a case of this size.

23 And you know, aside from that, Your Honor, as son
24 as Mr. Seshasayee -- he recognized what had happened here,
25 he did take quick action to notify Lehman Brothers Holding,

1 Inc., as Mr. Fail knows, we've been in touch for a while to
2 see if we can work through the issues. You know, I --

3 THE COURT: What's the -- the claim that Mr. Shesa
4 -- sheh --

5 MR. SCHECHTER: Seshasayee.

6 THE COURT: Yes.

7 (Laughter)

8 THE COURT: Filed is in the amount of \$199,000 or
9 so?

10 MR. SCHECHTER: That's the original claim, Your
11 Honor --

12 THE COURT: Yes.

13 MR. SCHECHTER: -- and if I can explain there as
14 well --

15 THE COURT: Okay.

16 MR. SCHECHTER: -- and I'm not going to profess to
17 be a tax expert, but Mr. Seshasayee worked under an
18 expatriate agreement with Lehman Brothers Holding, Inc.,
19 which they recognized in their own schedule of assets and
20 liabilities at the beginning of this case. Pursuant to that
21 agreement, the understanding that I have of that
22 relationship is that Lehman Brothers Holding Inc. agrees to
23 pay Mr. Seshasayee the net amount that he would earn, had he
24 stayed here in the United States. In exchange for them a,
25 taking care of his worldwide tax liabilities from the

1 relationship and b, assisting with the preparation of the
2 tax filings necessary from this more complex relationship.

3 So, he was obviously very dependent on them and to
4 your point, Your Honor, about the amount of the claim, some
5 of the internal notes that would show up even on, say, his
6 paycheck and the things that were submitted, they -- they
7 really are more Lehman Brothers Holding Inc. internal
8 notations at that point because again, my understanding is
9 what typically happens is, there's no immediate taking of
10 money out of a paycheck and paying it over to the government
11 because there is this expatriate relationship. There's sort
12 of a temporary waiver of that in exchange for paying the net
13 immediately to Mr. Seshasayee, but then satisfying all the
14 tax obligations.

15 So, the -- if you look closely at his proof of
16 claim, there's notations that refer to what looks like 2007,
17 which I think he may have even confused for notations that
18 then relate to 2008.

19 THE COURT: My question is, though, the amount of
20 the claim is \$199,000.

21 MR. SCHECHTER: As originally filed. We would
22 request, Your Honor, being --

23 THE COURT: Well, this is where I'm going, I mean,
24 because it -- it's generally a good idea to ask for
25 everything that you want all at once, so what you're now --

1 what you're now going to tell me, I think, is that not only
2 do you want reconsideration on the \$199-, but you want leave
3 to amend.

4 MR. SCHECHTER: That is correct, Your Honor, and
5 the basis for that would be that really, the information is
6 held by Lehman Brothers Holdings, Inc. as to what really all
7 these notations mean in a paycheck. I mean, one thing I'll
8 just mention and I thought about in coming here today, at
9 the beginning of a big case, you often see motions filed by
10 a Debtor that do certain things for employees of the Debtor,
11 and while those employees may be at the same priority level
12 that some other Creditors, there's a recognition there of
13 the relationship and maybe the uneven bargaining power and
14 you know, this Court being a Court of equity, which
15 certainly assists Debtors, will certainly assist other --
16 other parties. And this is that type of relationship where
17 all of a sudden, after 14 years, a back is turned on someone
18 who he himself and his family has been dependent on an
19 institution that has made him feel that he has their full
20 faith and credit behind what they say they're going to do
21 for him. And so that would be the basis for the amendment,
22 Your Honor.

23 THE COURT: Well, I hear you and I don't disagree,
24 but of course, I've had, unfortunately, hundreds if not
25 thousands of employees who maybe not were exactly similarly

1 situated but lost, you know, tremendous amounts of their
2 life savings and retirement as a result of what happened, so
3 that's --

4 MR. SCHECHTER: Sure.

5 THE COURT: -- that's highly unfortunate. I think
6 what -- what the basis for granting relief would be, would
7 be my being convinced that in fact, there was no notice and
8 that we ought to be able to dig into this. If I were to
9 grant reconsideration, it would put you back to the
10 beginning, so to speak --

11 MR. SCHECHTER: Right.

12 THE COURT: -- and it would not include, at this
13 moment, leave to amend.

14 MR. SCHECHTER: Okay.

15 THE COURT: I mean, there is a separate standard
16 for that and the facts are not before me, if it has to do
17 with different years, it's -- it would be an open question.

18 MR. SCHECHTER: The amendment that we're
19 discussing all relates to that same 2008 --

20 THE COURT: Well, again, that's not before me and
21 that's not part of your request so --

22 MR. SCHECHTER: Sure.

23 THE COURT: -- I just want to -- would want to be
24 clear that I suspected that that's where you might be going
25 with this, and that's why I asked the question.

1 MR. SCHECHTER: Thank you.

2 THE COURT: Why don't you let me hear from Mr.
3 Fail?

4 MR. SCHECHTER: Excellent.

5 THE COURT: All right, thank you.

6 MR. FAIL: Thank you, Your Honor. Garrett Fail,
7 Weil, Gotshal for Lehman Brothers Holdings, Inc.

8 Your Honor touched on almost all of the points in
9 -- and I'll try to keep it brief, Your Honor. The 60(b)
10 motion is the Claimant's motion and the Claimant bears the
11 burden on that. It's an extremely high standard, as Your
12 Honor mentioned and it's, you know, it's very obvious from
13 the case law, it is to be employed sparingly in the interest
14 of finality and consummation and conservation of scarce
15 judicial resources, as the District Court has noted in
16 Parish v. Solicito, amongst other Courts and cases.

17 So, the -- the question is, is there an injustice
18 here? And so, what the Claimant would have to show, amongst
19 other things, is that if there was an error, it was not due
20 to his fault and if there was an error, that there were
21 consequences, and I'd like to address both very briefly.

22 THE COURT: Okay.

23 MR. FAIL: With respect to whether or not there --
24 if there was an error, it was the Claimants' fault or the
25 plan administrators or the claims agents, Your Honor has

1 noted the -- the handwriting and you know, if you look at,
2 for example, the E's on the proof of claim that was supposed
3 to be -- what we thought was an E and is now being alleged
4 to be an R it doesn't look like it to the plan
5 administrator, Your Honor noted it can go either way. When
6 you compare it to the other R's that were written in
7 handwriting, you know, there's a stem on the other R's,
8 there's no stem on the E. But -- but that's only one piece
9 of the equation whether the handwriting -- certainly the
10 handwriting wasn't the plan administrator's fault.

11 But the other -- the other thing that Mr. -- or
12 that the Claimant could have done is check the claims
13 register. So, he filed a claim in 2009, months after the
14 petition, and then, you know, almost automatically, that was
15 available for checking on EPIC's website and it's free and
16 it's publicly available 24 hours a day, and anyone could
17 have gone on by searching their last name to check to make
18 sure that the address was correct when entered or at any
19 time after. The claim was filed in July of '09, the claims
20 objection was filed in February of 2012, there was ample
21 time to check and -- and possibly even update the address
22 unless the Claimant was continuously transient.

23 But I don't believe that there's any -- first of
24 all, there's no evidence whatsoever. There's a declaration
25 from a witness who has not been made available for cross-

1 examination, so all we have is -- there is no evidence in
2 the record on behalf of the Claimant. But if you were to
3 accept that in if it were testimony, which it's not, there's
4 no -- there's no evidence that he's transient through 2012
5 and couldn't have updated an address to a permanent address.

6 So -- so that goes to the Debtor -- and the plan
7 administrator's argument that it was not the Debtor's fault
8 and indeed, any error was in fact at the hands of the
9 Claimant, as unfortunate as it is.

10 The second point is the consequence of an error.
11 If this was sent to Tecunter instead of Tregunter, throwing
12 that address into Google, it automatically says, "Do you
13 mean Tregunter?" and every other portion of the address was
14 correct including the person, the street name, the
15 neighborhood, the zip code. So, it was -- it was suggested
16 in a reply that the Debtors didn't -- the plan administrator
17 didn't provide any case law. But looking at the case law,
18 including in re (indiscernible) Enterprises, Inc., it's
19 clear that there is still a presumption, the mailbox rule is
20 still in place, even with an incorrect address where there
21 is only a slight mistake. Consider, Your Honor, if Your
22 Honor were to receive mail to the Honorable Shirley Chapman
23 at Balling Green. The presumption would still be there and
24 then the burden is on the Claimant to prove that it didn't
25 arrive, or that you would have to prove, Your Honor, in that

1 instance that you didn't receive it. And the case law is
2 very clear that a mere denial of receipt is insufficient.
3 So, if the declaration were evidence, which it is not, the
4 mere denial is -- is insufficient. It's also hearsay --

5 THE COURT: Well, this a -- this is a very
6 squirrely thing here because I -- I think that, on the
7 misdelivery, misreading point, I'm inclined to agree with
8 you, but we don't have an individual who was residing at
9 that address, so we have another link in the chain and we --
10 we have no --

11 MR. FAIL: We don't know if they were friends, we
12 don't know how long they were friends, we don't know if he
13 was an expat that moved since --

14 THE COURT: We have literally no way -- we have no
15 way of knowing. We have no way of knowing.

16 MR. FAIL: And -- and under those circumstances,
17 Your Honor, the case law is very clear that the -- that the
18 Claimant hasn't met the burden and accordingly, the motion
19 should be denied.

20 With respect to other allegations that were made -
21 -

22 THE COURT: When did -- when did -- so the claim
23 was filed in 2009 --

24 MR. FAIL: Yes, Your Honor.

25 THE COURT: -- and in 2012, Judge Peck granted the

1 objection, and then what happened? It's 2016 now.

2 MR. FAIL: So Your Honor, we could only as --
3 well, we could only speculate, but one could easily
4 speculate that the Creditor who's saying that he was only
5 recently contacted by the IRS is only now concerned with
6 respect to the claim, but having been aware in 2008 that he
7 believes he has a claim, having filed a claim in 2009 but
8 not having paid the taxes to the IRS because he's also
9 disputing that he owes anything to the IRS, you could assume
10 that -- easily assume that he received the objection and
11 said, "Well, I didn't have to pay anything to the IRS in
12 2012, it was 2008 taxes, throw this piece of paper away, I
13 have a claim against another estate, and I don't need to
14 care," until he was later contacted by 2014, 2015 by the IRS
15 who says, "You owe money."

16 THE COURT: Well, I guess I -- I guess and -- and
17 maybe this is a question more for Mr. Schechter, but Mr.
18 Schechter's narrative was, this was a tumultuous time, it
19 was very difficult for the Claimant and his family, all of
20 which I, of course, can accept, but what I'm struggling
21 with, Mr. Schechter, is that you file a claim in 2009, you
22 would follow-up. You -- you started by telling me that it's
23 a small amount of money for Lehman Brothers but it's a big
24 amount of money for the Claimant, you would follow-up. So,
25 maybe you wouldn't follow-up in 2009, '10, '11, '12, you'd

1 begin to want to follow-up and part of me would like to know
2 -- I mean, part of this number now that -- and -- and I
3 don't know that the IRS is asserting, must include interest
4 and penalties. So the --

5 MR. FAIL: According -- according to the
6 declaration, Your Honor, that's all they're -- they're
7 seeking to add. It's -- it's late fees and penalties --

8 THE COURT: Right, so --

9 MR. FAIL: -- which the Claimant is disputing.

10 THE COURT: Right.

11 MR. FAIL: And then they're not even permissible
12 to be claims.

13 THE COURT: Which -- which -- which -- so then you
14 get into the equities shifting because if it was Lehman's
15 bad with respect to service, right, at that point, Lehman
16 had no way of knowing that -- that service had failed, they
17 thought they were done, and yet, there's a claim sitting out
18 there, that from the IRS's perspective, is continuing to
19 accrue interest. There was literally nothing that Lehman
20 could do in order to stop that clock. It had gotten an
21 order expunging the claim. So --

22 MR. FAIL: Even if it had paid, Your Honor, it
23 would have been cents on the dollar and that wouldn't
24 entitled any unsecured creditors post-petition interest and
25 penalties.

1 THE COURT: That's -- that's -- that's another
2 point, right? So -- so even -- so what this is coming down
3 to is at most, the reinstatement of the original claim, an
4 inquiry into, you know, what happened, if you will, during
5 all of those years, and then at most, what are the
6 recoveries at LBHI now up to, 27 cents?

7 MR. FAIL: Your Honor, yes, approximately.

8 THE COURT: Right. So, 27 cents on -- on some
9 amount and I find it hard to see my way to how the interest
10 and penalties would be on Lehman you know, as of a certain
11 point in time when it was certainly not Lehman's fault that
12 this wasn't addressed. So, this is not --

13 MR. FAIL: Your Honor, just a couple of other
14 points just --

15 THE COURT: Yeah.

16 MR. FAIL: -- just to correct the record. Mr.
17 Schechter mentioned throughout his -- his colloquy that
18 Lehman Brothers Holding Inc. was responsible, Lehman
19 Brothers Holdings, Inc., but when you look at the proof of
20 claim, either the -- the paycheck is the only thing attached
21 to the proof of claim, it says Lehman Brothers Global
22 Services Limited, which is a non-Debtor and not Lehman
23 Brothers Holdings Inc. That is the entity that issued the
24 check, that his the entity whose name is on the check and on
25 the stub, that was the only Lehman entity reference with

1 respect to the withholdings. There's no link whatsoever in
2 the proof of claim or otherwise -- just, you know, that's
3 not for today, Your Honor. The claim is expunged, there's
4 no claim to discuss, but just for the record, that -- I
5 needed to point that out. With respect to the schedules of
6 assets and liabilities, this Court has already acknowledged
7 the schedules and SOFFAs had notes which included wide
8 disclaimers. There was no admission whatsoever for -- for
9 virtually any claim in the schedules and the SOFFAs.

10 And with respect to the floodgate arguments, it
11 was said and it was mentioned and it was glossed over but I
12 -- I don't understand how they couldn't open the floodgates.
13 We've had 70,000 claims filed, we're down to the last, let's
14 say, you know, 1,100 outcome. To open up this one, which
15 was a liquidated claim, bring it back and possibility turn
16 it into an unliquidated claim would clearly open the
17 floodgates for claims that were filed (indiscernible)

18 THE COURT: Well, like I said, I'm not --

19 MR. FAIL: I know, Your Honor.

20 THE COURT: -- you know, I'm -- I'm not to --

21 MR. FAIL: I'm just -- I just wanted sort of --
22 for the record.

23 THE COURT: Yeah.

24 MR. FAIL: So, unless Your Honor has any other
25 questions, we think that the Claimant -- the plan

1 administrator respectfully suggests that the Claimant has
2 not met its burden under 60(b) to have its claims
3 reconsidered and the motion should be denied.

4 THE COURT: Right, thank you.

5 MR. FAIL: Thank you.

6 THE COURT: Mr. Schechter, anything more?

7 MR. SCHECHTER: Just very briefly. And again,
8 just with respect to the digitized, blown up letter, which
9 looks very blocky, again, I stand here a little bit
10 surprised that have not heard from the party who actually
11 has handled the claims administrator receipt, reading,
12 uploading to the website, sending out mailing and we have
13 attorney argument on what may have happened, but really, we
14 don't have any facts from the Debtor's side as to how that
15 was handled, what their process is, if they do receive this
16 kind of volume. I imagine there are questions that come up
17 from time to time.

18 THE COURT: But -- but Mr. Fail's point was that
19 it doesn't matter because it was, you know, close enough
20 that you know, you have the facts of -- of it's close
21 enough, so it's likely to have been delivered and there was
22 no -- and it wasn't returned for a bad address.

23 MR. SCHECHTER: And I guess "close enough" can be
24 a grey area, but written in English incorrectly and sent to
25 Hong Kong doesn't seem to fall into the close enough bucket,

1 you know, from where, I think, my client stands. And the
2 other thing I'll just mention is --

3 THE COURT: What about the -- what about the --
4 the lack of diligence? I mean, you -- you began by telling
5 me how important this is.

6 MR. SCHECHTER: Sure.

7 THE COURT: What about the lack of diligence on
8 the part of your client?

9 MR. SCHECHTER: Sure, I mean, the client filed his
10 claim timely, he understands this is a big estate. Was he -
11 - we all know how, you know, hefty the -- the docket is.

12 THE COURT: Sure.

13 MR. SCHECHTER: You know, independently, I have no
14 idea whether he was monitoring it or not --

15 THE COURT: Well, he found you at a certain point,
16 right?

17 MR. SCHECHTER: He did find me at a certain point.

18 THE COURT: So he could have found someone at an
19 earlier point to say, "Hey, this is really complicated and
20 big, can you call the lawyers, I can't even figure out who
21 they are?"

22 MR. SCHECHTER: This does come after a 14-year
23 relationship o f dependency upon Lehman Brothers Holding
24 Inc., though, and -- and I think something that really
25 relates to this issue and to the amendment issue, Your

1 Honor, is the basis for the objection itself. I haven't
2 heard any mention of why Lehman Brothers Holdings Inc. files
3 a schedule of assets and liabilities, says, "Yes, we know
4 Aadit Seshasayee, yes, we have an expatriate agreement with
5 him," which comes with obligations, and then Lehman Brothers
6 Holdings, Inc. later feels comfortable filing something that
7 says exactly the opposite.

8 THE COURT: Well, you know, we could have a debate
9 about that too.

10 MR. SCHECHTER: I'm sure there's reservations and
11 --

12 THE COURT: There -- there -- there absolutely
13 are, but in ballpark figures, can you tell me how much the
14 Claimant earned a year for Lehman -- I'll say "Lehman
15 Brothers" in quotes.

16 MR. SCHECHTER: Right. I mean, but -- the best
17 information I have would be what was on -- what was filed in
18 his proof of claim --

19 THE COURT: Mm hmm.

20 MR. SCHECHTER: -- which -- and again, I mean, his
21 -- his checks are a little bit complicated because there's -
22 -

23 THE COURT: Yeah, we --

24 MR. SCHECHTER: -- Lehman Brothers Holdings Inc.
25 internal --

1 THE COURT: Right.

2 MR. SCHECHTER: -- language here.

3 THE COURT: Right.

4 MR. SCHECHTER: But you know, this -- this would
5 indicate gross pay of \$849,000.

6 THE COURT: I gue -- yeah. I guess the point is
7 that, and there's no need to really belabor this, you know,
8 you talk about a 14-year relationship of -- of dependence
9 but he wasn't a low level employee, he was a high-earning
10 employee with some sophistication, you know, working around
11 the globe, so I think that that rather cuts the other way in
12 terms of his ability to find his way to somebody who could
13 have helped him, you know, sort out the process. Be that as
14 it may, I have serious reservations about the ability to
15 pursue anything beyond the amount of the filed claim but
16 that's not before me today. And I think that that would
17 indeed open the floodgates argument, but again, that's not
18 before me today. And because it's basically a
19 (indiscernible) I'm going to allow the claim to be
20 reinstated and put us back to the starting gate and allow
21 the Debtor to engage on the merits of the claim. You ought
22 to bear in mind that a \$200,000 claim at, at most, you know,
23 I'm always hopeful that the distribution sums of your
24 Creditors are going to increase, at most 30-some cents on
25 the dollar, maybe 40 if Mr. Fail works extra hard, he's

1 shaking his head no --

2 (Laughter)

3 MR. FAIL: Your Honor, this is a general unsecured
4 claim, this is not a senior claim, this is --

5 THE COURT: Yeah.

6 MR. FAIL: I don't think so.

7 THE COURT: So -- so that's what we're going to
8 do, all right?

9 MR. SCHECHTER: Thank you.

10 THE COURT: All right, so I'll grant the motion to
11 the extent that it puts us back in the position that we
12 would have been in, and it remains subject to LBHI's
13 objection. To the extent that you wish to amend the claim,
14 that's going to have to be the subject of a -- of a separate
15 proceeding. The -- I -- I pause on the amount of the
16 recovery because you know, these many years later, you know,
17 I always like to remind people that at the beginning, there
18 wasn't thought to be anything for anybody and at LBI,
19 customer claims have been paid in full, unsecureds are
20 getting returns and here, unsecureds are getting returns as
21 well, so.

22 MR. SCHECHTER: Sure.

23 THE COURT: I'd just like to --

24 MR. SCHECHTER: Definitely good news in a large
25 case.

1 THE COURT: -- I -- I just like to -- I just like
2 to remind folks --

3 MR. SCHECHTER: I don't disagree with that, Your
4 Honor.

5 THE COURT: Okay. All right, thank you very much.

6 MR. SCHECHTER: Thank you again.

7 MR. FAIL: Thank you, Your Honor.

8 THE COURT: All right, thank you, Mr. Fail.

9 MR. FAIL: Your Honor, if we may be excused --

10 THE COURT: Yes.

11 MR. FAIL: -- I'll turn the -- the podium over --

12 THE COURT: Please.

13 MR. FAIL: -- to the next parties, thank you.

14 THE COURT: Thank you.

15 (New counsel takes position.

16 THE COURT: Good morning, how are you?

17 MR. LIVSHIZ: Good morning, Your Honor. Happy new
18 year.

19 THE COURT: Happy new year.

20 MR. LEITNER: Good morning.

21 THE COURT: Good morning.

22 MAN: Good morning.

23 THE COURT: You can have a seat. All right, so
24 all we're talking about today is whether or not we're going
25 to have amicus briefs, yes?

1 MR. LIVSHIZ: That's correct.

2 THE COURT: And Lehman says no.

3 (Laughter)

4 THE COURT: And you folks say yes. So, this is
5 different from Intel. Who's here for ISDA?

6 MAN: (indiscernible)

7 THE COURT: Hi.

8 MAN: Hi.

9 THE COURT: So this is different than Intel, don't
10 you think?

11 MR. LIVSHIZ: In the respect that the posture of
12 the case is different?

13 THE COURT: No, that's not what I mean. In
14 respect to the nature of the amicus. I mean, in -- in
15 Intel, the question that I had was how to interpret the ISDA
16 and the master -- the master agreement and the drafting
17 history et cetera, et cetera, and because ISDA is ISDA and
18 wrote the ISDA --

19 (Laughter)

20 THE COURT: -- you know, it was, to me, a much
21 clearer case for hearing what ISDA had to say. Here, it's a
22 question of law and all of you folks are simply saying --
23 urging that, to be -- not to mince words, Judge Peck was
24 wrong. That -- that's the -- that's the collective position
25 of what you're saying. So it's -- it's really different

1 from what -- what we saw in Intel, where that brief, which
2 was also opposed on the basis that it was -- I mean the
3 interesting thing in Intel, and I assume you're familiar
4 with it, was that it was filed along with Intel's brief. It
5 wasn't a situation where the amicus party waited for all the
6 briefs to come in and then weighed in. So it was clearly a,
7 you know, a -- a partisan piece. I mean, I -- I think, for
8 the most part, most amicuses are. I think that that part of
9 the juris prudence on when they should be filed is a little
10 odd. But be that as it may, what I'm most interested in is
11 -- a response to the argument that Lehman makes is, this is
12 just piling on of folks saying that on the law, I should do
13 one or the other thing. So, you want to respond to that?

14 MR. LIVSHIZ: Yes, Your Honor. Should --

15 THE COURT: Sure.

16 MR. LIVSHIZ: So the inherent question Your Honor
17 is bringing up is what, if I may, what additional can the
18 amici provide?

19 THE COURT: Well, it's supposed to be -- it's
20 supposed to be -- it's supposed to allow, if it's helpful to
21 the Court.

22 MR. LIVSHIZ: Right.

23 THE COURT: Right?

24 MR. LIVSHIZ: In this particular case, especially
25 given -- and speaking for SIFMA and ISDA specifically, these

1 are two of the largest trade associations in the world with
2 members heavily involved in diverse and various roles in
3 (indiscernible) transactions that can provide several unique
4 perspectives, not the least of which is a discussion about
5 policy of market impacts on the Court's decision on these
6 transactions, a decision that transcends the 47 underlying
7 CDM transactions and goes to the heart of how termination
8 and liquidation provisions are to be treated in swap
9 agreements not limited to CDMs, but including currency
10 swaps, interest rate swaps and credit default swaps. So the
11 perspective of the amici of ISDA and SIFMA specifically is
12 to provide that layered, nuanced understanding of, this is
13 the -- these are the market expectations, these were -- this
14 is how the ISDA agreements, how these provisions are thought
15 of and how they are expected to -- to be effectuated, and
16 also, specifically with ISDA, who had a significant role to
17 play in the enactment of Section 560 and the related Safe
18 Harbors in 1990, had understanding of the Congressional
19 intent behind the publication of the Safe Harbors.

20 So, the new that the organization are providing is
21 that legal interpretation from the perspective of the
22 industry, the market expectations and the policy
23 implications behind the critical decisions that are before
24 this Court, which these org -- which these associations are
25 uniquely positioned to provide assistance on.

1 THE COURT: So, your focus is, in particular, on
2 Bank of New York, right? Judge Peck's decision on Bank of
3 New York, which was issued when? 2010, I think?

4 MR. LIVSHIZ: 2010, correct.

5 THE COURT: Okay, so it's 2016. Huge market
6 turmoil in the six years since 2010?

7 MR. LIVSHIZ: In respect to whether the world has
8 ended kind of post-BNY, certainly, you know, the world has
9 continued but that doesn't say, and from the perspective of
10 our members, that there hasn't been great uncertainty in the
11 enforcement of the agreements to which they've executed. And
12 the agreements that are still being contemplated, on whether
13 they are going to be enforced as written and as executed by
14 the parties.

15 THE COURT: Well, it's interesting that you say
16 "as written" because that gets to another interesting point,
17 which is that, that's my job is to interpret the documents
18 as written, and you're telling me off the top that what
19 you're here to tell me is market expectation and the
20 industry's view of Congressional intent. So that's, you
21 know, a couple layers of hearsay and contrary to the tenets
22 of statutory construction, I would have to find an ambiguity
23 to consider any of that, right? So, why can't -- I mean,
24 why doesn't it simply come down to Lehman basically
25 stipulating that a ruling in their favor would be contrary

1 to various market expectations?

2 MR. LIVSHIZ: Well, the mar -- excuse me, Your
3 Honor. The market expectation and the industry perspective
4 is helping to influence -- is a tool to understand how these
5 agreements are -- are treated and certainly the
6 understanding of the parties when they entered them. But it
7 is the perspective of SIFMA and ISDA that there is a very
8 clear and explicit legal interpretation to -- to these
9 underlying agreements.

10 THE COURT: Okay, but all of the defendants in the
11 distributed action, dozens of them, dozens of them,
12 represented by the very best law firms and the very best
13 lawyers at those law firms, don't you think they can be
14 counted on to make all of these arguments on behalf of their
15 clients, many of whom are members of the amici
16 organizations? Surely, that A-list of lawyers is going to
17 make all the arguments that you're going to make. Don't you
18 think?

19 MR. LIVSHIZ: I think to the extent that there is
20 overlap, the amici would serve a reinforcing function to --
21 to say that, especially given the involvement of ISDA in the
22 formulation of -- of the Safe Harbors, which are a central
23 role in this dispute, it would reinforce the correctness of
24 the interpretation by the noteholder defendants.

25 THE COURT: What about the inequity of -- of

1 Lehman having page limitation and the defendants,
2 essentially, not having the page limitation?

3 MR. LIVSHIZ: So is Your Honor getting to the
4 question of whether or not -- that the amici are serving as
5 an extension of the defendants?

6 THE COURT: Yeah. I mean, you -- you -- you're
7 not supposed to be making arguments that are duplicative,
8 right, so you just told me you're making arguments that
9 there -- if it's -- if it's merely duplicative, it's not
10 helpful to me, right, because that just means I have to read
11 more stuff that duplicates what somebody else wrote. So if
12 it's in addition, then it's more pages, and Lehman has a
13 page limitation, so that doesn't seem fair either.

14 MR. LIVSHIZ: The -- you know, SIFMA and ISDA
15 independently came to and drafted their opinions. They are
16 not in any way an extension on the defendants.

17 THE COURT: Of course they are. You just -- you
18 just told me they're reinforcing the Defendant's arguments.

19 MR. LIVSHIZ: We agree with the perspective of the
20 defendants, not because there's a bias or favor to the
21 defendants, because we believe in the underlying -- in that
22 outcome, in the fact that Lehman's claims, if they were
23 victorious, would be a misinterpretation of the
24 (indiscernible)

25 THE COURT: There's not just a bias for the

1 defendants, there's an absolute alignment with the
2 defendants. I mean, let's -- let's just be very clear here,
3 which -- which I don't view as a disqualification --

4 MR. LIVSHIZ: Mm hmm.

5 THE COURT: -- for -- for being an amicus but --
6 but there's an absolute alignment here. It's no -- there's
7 no grey, there's no -- there's no grey area. Why don't I
8 hear from Lehman, okay? Thank you.

9 MS. LEITNER: Your Honor, if I may, can I speak on
10 behalf of the estate (indiscernible) or would you prefer --
11 I can go after Lehman if you --

12 THE COURT: Well, do you have anything to say
13 that's different from what I just heard?

14 MS. LEITNER: I do, Your Honor.

15 THE COURT: Okay.

16 MS. LEITNER: Good morning, Your Honor, Shannon
17 Leitner from Freshfields Bruckhaus Deringer US, LLP on
18 behalf of the Structured Finance Industry Group or SFIG.

19 Your Honor, on a couple of points that you seem
20 troubled by that I'd like to address, specifically, on
21 whether SFIG's brief is, you know, spending page limits and
22 just piling on. As an initial point, we haven't completed
23 briefing on this motion to dismiss. It's entirely possible
24 Lehman has amici or are about to move to file an amicus
25 brief in support of their opposition to the omnibus

1 Defendant's motion to dismiss.

2 So, the fact that there are amici here who are
3 interested in this case and are interested in supporting the
4 Defendant's position is not simply piling on. If that were
5 the case, that would be true of every single amicus brief,
6 and I think as Your Honor is well aware, it's very common in
7 this Circuit, in this District, in this Chapter 11 case, to
8 have amicus briefs on important issues.

9 Separately, in terms of whether the lawyers in the
10 defense group are able to adequately represent SFIG's
11 position, we would respectfully state that the lawyers in
12 the defense group are representing the noteholder
13 defendants. By definition, they're only representing a
14 sliver of the market. SFIG, by contrast, has members from
15 across the entire market, including issuers, Trustees,
16 servicers, and in fact, Weil, Gotshal, counsel to the Debtor
17 here, is a member of SFIG as well. Therefore, presenting a
18 market perspective of policy arguments related to these
19 legal questions, it has more weight, Your Honor, because it
20 represents this broad, diverse view from the market.

21 And then finally, Your Honor asked questions about
22 concern in the market and the repercussions of the BNY
23 decision, and SFIG respectfully feels that it's -- it's too
24 soon to tell the full repercussions from Judge Peck's
25 decision in 2010, and yes, it has been six years, but it has

1 affected how parties view these transactions, and it has put
2 some uncertainty into the market. And to simply wait for
3 Armageddon to come to allow the industry groups to speak up
4 and voice what they view the (indiscernible)

5 THE COURT: What -- what Armageddon -- what
6 Armageddon would that be?

7 MS. LEITNER: The Armageddon would be some sort of
8 dramatic, financial collapse that -- that comes. I mean, I
9 -- I guess where I'm going with this Your Honor, is that --

10 THE COURT: But then you -- then -- then in your
11 world, right, you have Peck said one thing and Chapman said
12 another thing, hypothetically, right?

13 MS. LEITNER: Sure.

14 THE COURT: So, that looks pretty uncertain too
15 because, I don't know, Peck's pretty smart, you know?

16 (Laughter)

17 MS. LEITNER: Yes, yes, Judge Peck is quite smart.
18 But Your Honor, like, I guess the point is that now is the
19 time to like, hear these voices but that SFIG is
20 representing a broad array of the market and there's no
21 reason to deny them the opportunity to weigh in and to
22 present the perspective of the market, which again, is a
23 diverse view from all aspects of the market. And you know,
24 with all due respect to Judge Peck and his decision to -- to
25 allow SFIG's views on the policy arguments, which is a legal

1 interpretation question, to be before Your Honor when you
2 consider the current omnibus motion to dismiss.

3 THE COURT: Thank you very much.

4 MS. LEITNER: Thank you.

5 THE COURT: All right, Mr. DeFilippo?

6 MR. DEFILIPPO: Thank you, Your Honor. I'll try
7 to be brief because Your Honor has hit most of my points in
8 questioning counsel for the movants. We did -- we do agree
9 with the partisan nature of the amicus and I won't say
10 anything more than that. That seems to be obvious.

11 Your Honor correctly focused in on the two issues
12 that guide your discretion, which are whether the amicus add
13 anything that's unique to what you have before you and
14 whether their submissions are duplicative, and what they
15 have proposed to add that is supposedly unique on a motion
16 to dismiss is not able to be considered by Your Honor.

17 THE COURT: Meaning background information.

18 MR. DEFILIPPO: All -- all of the -- let me go
19 through a brief list of the hearsay or otherwise
20 inadmissible or inappropriate to consider information that
21 pervades their briefs, which they want you to consider on a
22 motion to dismiss.

23 On the SIFMA/ISDA brief at Page 1, they cite to a
24 2009 ISDA derivatives usage survey. How can you possibly
25 consider that on a motion to dismiss? On Page 2, they cite

1 the requirements of the rating agencies. On Page 6, they
2 cite the evidence regarding growth in the size of the swap
3 market. On Page 10, they cite to the claim that we are
4 perpetuating uncertainty in the markets, which as Your Honor
5 correctly noted has not been the case since 2010. On Page
6 11, they cite to statistics from Fitch Monitoring. On Page
7 12, an article from the Financial Times. On Page 13, a
8 Moody's circular, a Fitch's rating circular, an SNP circular
9 and a compendium of rating agency criteria. And on Page 14,
10 the entire discussion of what the participants in the CDO
11 market did or expected. None of that is properly before
12 Your Honor on a motion to dismiss and therefore, they offer
13 no unique perspective.

14 Similarly, the SFIG brief at Page 5 talks about
15 market's participant views based on a cite to a treatise,
16 what market's participants rely on and why ratings are
17 important on Page 6. On Page 7, they note three
18 inappropriate things, a treatise by (indiscernible) what has
19 happened in SFIG's experience. How could you possibly
20 consider that? And various rating agency documents. On
21 Page 8, they perpetuate it by arguing that failing to
22 include the flip clauses would have substantially impaired
23 the ability to sell the notes. I -- I don't know if that's
24 true and Your Honor shouldn't even think about it on this
25 motion.

1 The so-called critical importance of the flip
2 clauses and SFIG's views of what noteholders want. They say
3 nothing usable that the defendants have not already said,
4 and therefore, it's not an appropriate subject for an amicus
5 submission, Your Honor. And in addition, as you pointed
6 out, we negotiated in the second scheduling order, page
7 limits and filing dates and response dates. Nobody ever on
8 the other side said, let's fold in something for the amicus.

9 Now, I'd be surprised if they weren't thinking
10 there might be amicus showing up since they've shown up in
11 all these cases, and by the way, let me talk about the cases
12 they cite, because it's misleading for them to say that
13 their -- their precedent to support the admission of amicus
14 when one of the parties opposes them. As the cases have
15 said, when a party opposes an amicus submission, it's rare
16 to permit. Now, in the Intel adversary and the Chase
17 adversary, the filing of amicus submissions was actually
18 unopposed by Lehman. If you look at Chase, there was a
19 stipulation permitting it that Lehman signed, and if you
20 look at Lehman's brief in Intel, Lehman said, "We do not
21 oppose the filing of the amicus submission. We think it's
22 wrong for the filing (indiscernible)".

23 THE COURT: That's right. That's right, you're
24 right.

25 MR. DEFILIPPO: There is no indication in any of

1 the cases they cite that actually opposed the submissions by
2 the amicus. If you look through (indiscernible), there's
3 nothing. If you look through Enron, there's no opposition
4 noted to the amicus filings. None of those cases address
5 the issue before you, which is whether you should permit an
6 amicus filing in a motion to dismiss when one of the parties
7 has opposed it. We think the factors that inform your
8 discretion clearly say no. Thank you, Your Honor.

9 THE COURT: All right, thank you. All right, I'm
10 interested in -- in hearing a response to the points that
11 were made about how many, many of the points in the briefs I
12 can't even consider on a motion to dismiss.

13 MR. PINCUS: Your Honor, may I?

14 MR. DEFILIPPO: Sure. I mean, it -- it's not --
15 we're -- we're not at the merits, we're -- we're at a motion
16 to dismiss and it does say in SFIG's reply brief, for
17 example, SFIG is offering legal arguments and background
18 information. I -- I don't look at background. I look --
19 it's 12(b)6, right? So all of the things that Mr.
20 DeFilippo read are not things that I can consider.

21 MR. PINCUS: Your Honor, I -- I'm --
22 (indiscernible) I should have introduced myself in the
23 beginning, Daniel Pincus of Orrick, Herrington & Sutcliffe.
24 I apologize for that.

25 THE COURT: It's all right.

1 MR. PINCUS: I believe -- I -- I can't speak to --
2 to SFIG's statement, I'll certainly leave that to -- to the
3 other counsels, but a couple points I will be discussing,
4 and I do want to emphasize one point that the SFIG counsels
5 made, which is the diversity of representation within these
6 organization, particularly SIFMA and ISDA.

7 THE COURT: But it's a motion to dismiss --

8 MR. PINCUS: Right.

9 THE COURT: -- being brought by the defendants in
10 this action. So, on a motion to dismiss, where all I do is
11 assume that the allegations are true and look at the law,
12 how could I possibly consider what other people who care
13 about it might think? I'm just having a really hard time
14 with that.

15 MR. PINCUS: One of the core -- I'm sorry.

16 THE COURT: It's a motion to dismiss, right?

17 MR. PINCUS: Right.

18 THE COURT: I'm just having a really hard time
19 with that.

20 MR. PINCUS: One of the core functions of an
21 amici, as recognized by the Southern District is to provide
22 the policy market assessment perspective, and the fact that
23 you have articles that you have protestations emphasizing
24 the same points, and certainly that (indiscernible) created
25 from the Dante decision --

1 THE COURT: By Dante you mean Bank of New York?

2 MR. PINCUS: By Bank of New York, correct, Your
3 Honor. If anything attests to the significant market
4 impacts of the current dispute, these --

5 THE COURT: But I go back to what I said before,
6 okay? We can stipulate that it will -- that -- that a
7 ruling against the defendants -- the -- that the defendants
8 and the amici believe it will have a significant market
9 impact. Okay, but I still have to decide a motion to
10 dismiss and it is reverse -- would be reversible error to
11 consider things that are not part of that very narrow
12 record. So I'm -- I -- I have a heightened concern about
13 that very fact. I mean, and -- and I -- and we're at the
14 motion to dismiss phase. I mean, in Intel, right, and Mr.
15 DeFilippo can correct me if I'm wrong, those were cross
16 motions for summary judgment, yes?

17 MR. DEFILIPPO: Yes, Your Honor.

18 THE COURT: It's different.

19 MR. PINCUS: Correct, Your Honor. In JP Morgan,
20 that was a motion to dismiss and those were briefs and
21 briefs were allowed that spoke to the legal -- and the same
22 panoply of issues, the legal and policy impacts of -- of --
23 of the considerations (indiscernible) by the Court at the
24 time. And on a motion to dismiss posture. It's -- and the
25 Southern District has a long history of allowing amici

1 discussing these sorts of issues, examples of which are in
2 our brief, at the motion to dismiss stage. It is certainly
3 not an abhorrent thing that amici are presenting these
4 critical perspectives at this juncture in a case, especially
5 a case such as this, where there are such significant
6 downstream consequences by the Court's decision.

7 THE COURT: All right, thank you.

8 MS. LEITNER: Your Honor, if I may?

9 THE COURT: Sure.

10 MS. LEITNER: Certainly, Your Honor, I join in
11 everything Mr. Pincus just said and further, I would point
12 out that, in addition to all of the examples we've pointed
13 out of Courts considering an amicus brief on a motion to
14 dismiss, think of famous cases like (indiscernible) that was
15 a motion to dismiss. That went all the way up to the
16 Supreme Court and there are numerous cases where amici are
17 welcome -- welcomed and are --

18 THE COURT: How can I consider things that are not
19 part of the -- the record that are not alleged in the
20 complaint. How can I do that?

21 MS. LEITNER: Certainly, Your Honor. Because what
22 -- what the -- what SFIG's brief is trying to do is to argue
23 legal arguments about why policy considerations, which are
24 appropriate in interpreting the -- the motion to dismiss
25 before you and to offer the industry's perspective on the

1 effects of these, which are things that one can consider on
2 a motion to dismiss.

3 THE COURT: What's your authority for that
4 statement?

5 MS. LEITNER: Certainly, it's -- and Your Honor,
6 if you look to the cases that we cite in our -- in our reply
7 papers, and if you further look at our brief, if you -- Mr.
8 DeFilippo's examples stop halfway through our brief. He
9 doesn't point out that in Pages 18 to 21, we talk about
10 legal arguments that --

11 THE COURT: Okay, but I'm -- I'm -- that's -- I'm
12 not talking about that, but what about all the examples he
13 gave, which are things that are completely extraneous to the
14 complaints? How could I consider any of those on a motion
15 to dismiss.

16 MS. LEITNER: Your Honor, we respectfully submit
17 that -- that those authorities are meant to support the
18 policy arguments that we make in parts B and C of our brief
19 that discuss legal questions about the interpretation of
20 contracts, about the interpretation of the meaning of the
21 word "liquidation", and that those are legal arguments which
22 are supported by the authorities we cite in our brief.
23 There's nothing further, Your Honor.

24 THE COURT: All right.

25 MS. LEITNER: Thank you.

1 THE COURT: I mean, here's the problem. The
2 problem is that in order to prepare for today, I had to read
3 these briefs. That's the problem. So I think that's a --
4 that -- you know, it's kind of a flaw in the process because
5 it's very hard to unread something that you've read. I have
6 serious concerns about the usefulness of this and again, I,
7 you know, even Judge Peck himself acknowledged that his
8 decision would go against market expectations. So I get
9 that point, but I still -- it's still my job to read the
10 words and to figure out how to -- how to interpret them.
11 And -- and I certainly don't want to commit reversible error
12 by considering things that are not properly before me, and I
13 -- I truly, at this juncture, don't see how I can consider
14 the elements that Mr. DeFilippo pointed out.

15 That being said, I have this problem of not being
16 able to unread what I read, but Lehman needs to have an
17 absolute, full opportunity to respond to everything that was
18 said without worrying about page limits. But what I'm not
19 going to have, then, is the defendants then piling on and
20 addressing the arguments that Mr. DeFilippo makes. So,
21 there has to be some rational limitation and non-duplication
22 to what is said. And already, we have, I think, a lot of
23 duplication. So, Mr. DeFilippo --

24 MR. DEFILIPPO: Yes, Your Honor?

25 THE COURT: -- what -- what would you propose to

1 solve this dilemma, I mean, besides not letting them file
2 something?

3 MR. DEFILIPPO: Well, it sounds like Your Honor
4 appreciates the inappropriateness of substantial portions of
5 the brief and the duplicative nature of the balance of the
6 briefs. Now, there are no new legal --

7 THE COURT: Well, I -- I -- I don't -- I have
8 concerns.

9 MR. DEFILIPPO: Yes.

10 THE COURT: I have concerns and questions about
11 how I could consider some of the materials that you've
12 highlighted, and then when you segue into the legal
13 argument, I have concerns that it's merely duplicative,
14 because as I said when I started, it's beyond what I could
15 imagine that all of the sophisticated defendants represented
16 by top flight law firms would miss a legal argument.

17 MR. DEFILIPPO: They're the same arguments.
18 Exactly the same arguments, and yet, they're made with
19 different words, so we would need -- if you permit them, we
20 would need to respond to them within the existing
21 constraints which, you know, we're already finding are, you
22 know -- (indiscernible)

23 THE COURT: Well, I'm going to -- I'm -- I'm going
24 to -- because I can't unread what I read, I'm going to lift
25 the existing constraints, but -- but we're not going to have

1 -- I mean, do you folks think that your -- that -- that you
2 would have the opportunity to file a further brief? A reply
3 brief?

4 MS. LEITNER: Sure, Your Honor.

5 MR. LIVSHIZ: Sure.

6 THE COURT: Good answer.

7 MR. DEFILIPPO: Well, can -- can we agree that a
8 response to the factual material is unnecessary?

9 THE COURT: Yes.

10 MR. DEFILIPPO: Okay. If that -- if that's the
11 case, then if you --

12 THE COURT: Yes, a response to the factual
13 material is unnecessary beyond what you've already
14 articulated, and presumably would want to say in more
15 elaborate terms, which is that it's inappropriate to be
16 considered at this stage of the proceedings. Look, at the
17 end of the day, any Court that takes amici considers them,
18 you know, how -- at the level they think is appropriate.

19 MR. DEFILIPPO: I had actually --

20 THE COURT: So --

21 MR. DEFILIPPO: -- a request for clarification,
22 Your Honor. Does -- if Your Honor is inclined to permit
23 some amicus filing, does that mean they're in the case for
24 the balance of its life?

25 THE COURT: No. No, it does not.

1 MR. DEFILIPPO: Every time they want to submit
2 something, they need to make a motion?

3 THE COURT: Absolutely.

4 MR. DEFILIPPO: Okay.

5 THE COURT: They -- they're -- absolutely.
6 They're -- this is a motion, they're seeking leave to file -
7 - to be amici on this motion. They're -- they're not in the
8 case going forward, and as you'll recall from -- or maybe
9 you won't, I'm sorry, it was Mr. Tombay who was here for
10 Intel. ISDA did not argue at the -- at the hearing. ISDA
11 was here, enthusiastically nodding when I was saying things
12 that were right --

13 (Laughter)

14 THE COURT: -- and looking concerned when I
15 wasn't, but they -- they did not argue. So it is -- you
16 know, it is -- it is limited.

17 MR. DEFILIPPO: Just a briefing, no argument?

18 THE COURT: Yes. Yes, and no -- and no reply. So
19 you -- you get to respond to what they say and they don't
20 get to reply.

21 MR. DEFILIPPO: Okay. Well, I sense that Your
22 Honor would permit us, perhaps, an additional few pages and
23 --

24 THE COURT: An additional whatever you like.

25 MR. DEFILIPPO: Well, we need to consult with the

1 defendants as a group, I suggest, to make that work for them
2 as well, but okay.

3 THE COURT: Okay?

4 MR. DEFILIPPO: Thank you, Your Honor.

5 THE COURT: All right, so that's what we're going
6 to do if you folks will work together to prepare an
7 appropriate order and submit it to us, I would appreciate
8 it. Mr. DeFilippo, before you leave, and maybe it's not
9 appropriate to have a -- a detailed conversation about this,
10 but in -- in light of today's events and generally speaking,
11 we ought to begin talking about a timeframe for actually
12 having a hearing.

13 MR. DEFILIPPO: Yes, Your Honor, I agree.

14 THE COURT: So, when you engage with the
15 defendants, could you begin to raise that topic? I don't
16 think that you were expecting to come in in February, right?

17 MR. DEFILIPPO: No, we -- we -- they have time to
18 submit a reply.

19 THE COURT: Right.

20 MR. DEFILIPPO: So it probably won't be until the
21 spring.

22 THE COURT: So -- yeah, so that the -- the spring
23 would be looking good. So -- but the -- the sooner the
24 better to really talk about a date because I think we're
25 going to need to set aside a lot of time and the calendar

1 has a way of filling itself up, so.

2 MR. DEFILIPPO: Yes, Your Honor, we'll do that.

3 THE COURT: All right, okay.

4 MR. DEFILIPPO: Thank you.

5 THE COURT: Thank you all very much.

6 (Whereupon these proceedings were concluded at

7 11:05 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

Sonya
Ledanski Hyde

Digitally signed by Sonya Ledanski
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Date: January 22, 2016